



Texas Rehabilitation Commission

"A Human Energy Agency"

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Opinion Committee

VERNON M. ARRELL
Commissioner

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September 25, 1995

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The Honorable Dan Morales
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FILE # ML-35941-95

I.D. # 36058

**RE: REQUEST FOR RECONSIDERATION OF
DM-346 (MAY 3, 1995) AND REQUEST FOR
OPINION**

Dear General Morales:

The Texas Rehabilitation Commission (TRC) requests a reconsideration of the Attorney General's decision in Opinion No. DM-346, dated May 3, 1995, in which Art. V, Sec. 53, of the 1993 General Appropriations Act was interpreted to apply only to the purchase of director's and officer's liability insurance against risks arising under the Texas Tort Claims Act.

Pursuant to §402.042 of the Tex. Gov't. Code, the TRC also requests your opinion as to whether Article IX, Sec. 57, of the 1995 General Appropriations Act can be interpreted to expand director's and officer's liability insurance coverage to include risks arising under the common law and statutes.

INTRODUCTION

The Attorney General's decision in Opinion No. DM-346 addressed the following issues:

"Whether article V, §53 of the 1993 General Appropriations Act authorizes the Texas Workers Compensation Commission to obtain liability insurance for its employees and whether the purchase of director's and officer's liability insurance by a state agency as authorized by that provision constitutes a waiver of the state's sovereign immunity."

The text of Sec. 53 is as follows:

"Sec. 53. Tort Claims Act. None of the funds appropriated in this Act may be expended for the purpose of purchasing policies of insurance covering claims arising under the Texas Tort Claims Act. Notwithstanding the foregoing, state agencies may purchase director's or officer's liability insurance with appropriated funds for the agency's appointed commission or board members and executive management staff." (emphasis supplied)

After reviewing the text of Sec. 53 the Attorney General answered the first issue raised by the Workers Compensation Commission in the affirmative but limited the coverage to board members and executive staff¹ and to claims arising under the Tort Claims Act.

The second issue, whether Sec. 53 waived the State's sovereign immunity, was answered in the negative. However, no consideration was given to the risks to which the management staff of state agencies are exposed on a daily basis, suits against state employees in which they are named as defendants in their individual capacity, or the need for additional coverage of such risks.

The Attorney General's assumption that Sec. 53 limited coverage to claims arising under the Tort Claims Act results in the confusing statement that:

"Section 53 prohibits the use of appropriated funds for the purchase of liability insurance covering claims under the Tort Claims Act and permits the use of appropriated funds for the purchase of director's and officer's liability insurance." (emphasis added)

DM-346, page 2.

This request for reconsideration focuses on the limitation placed on this permission to purchase director's and officer's liability insurance. The Opinion holds that coverage is limited to claims arising under the Tort Claims Act.

The Attorney General's office was aware that this limitation creates a question as to the utility of such coverage:

"⁸As noted above, the Texas Tort Claims Act does not waive individual immunity. See Civ. Prac. & Rem. Code §101.026. A suit against a state employee or member of a state governing body in his or her personal capacity would not arise under the Texas Tort Claims Act. In addition, a state employee or member of a state governing body is entitled to indemnification in suits arising out of a broad range of official conduct. See id. ch. 104. If we are correct that the second sentence of section 53 refers only to director's and officer's liability insurance

¹The Opinion also indicates that Sec. 53, in connection with Sec. 101.027(a) of the Civil Practice and Remedies Code, authorizes the agency to obtain liability insurance for employees at no cost to the State.

covering claims arising under the Texas Tort Claims Act, then it is difficult to imagine what sort of claims such insurance would cover." (emphasis added)

DM-346, page 6, footnote 8.

This footnote amounts to an admission that DM-346's interpretation of Sec. 53 produces a result which authorizes agencies to buy insurance which is not needed but denies agencies the authority to buy insurance which is needed to cover real risks to board members and executive managers. Moreover, it begs the question as to which suits against the State's officers and directors arising under the common law or statutes can waive individual immunity and subject the individual to a judgment for damages exceeding the indemnification limits of the Civil Practice and Remedies Code, §104.003(a).

TRC maintains that the acts of directors and officers of state agencies expose them to individual liability and that agencies may purchase director's and officer's liability insurance to cover these risks which may be constitutionally provided as an appropriate employee benefit.

Accordingly, TRC requests that the Attorney General reconsider DM-346 and find it wrongly decided; and issue a new opinion based upon Sec. 57, Purchase of Insurance, located in the General Appropriations Act of 1995.

POINT

Whether the new caption of Sec. 57 in the General Appropriations Act of 1995 using the term "Purchase of Insurance" instead of "Tort Claims Act," (which clearly shows a legislative intent to allow agencies to expand their purchase of insurance coverage) requires the conclusion that DM-346 was wrongly decided.

Sec. 57 of the 1995 General Appropriations Act, 74th Legislature, House Bill 1, Art. IX, Sec. 57, under the heading "Other Expenditure Limitations," replaced Sec. 53 of the 1993 General Appropriations Act, and it now reads as follows:

"Sec. 57. Purchase of Insurance. None of the funds appropriated by this Act may be expended for purchasing insurance to cover claims arising under the Texas Tort Claims Act. Notwithstanding the foregoing, a state agency may purchase director's or officer's liability insurance with appropriated funds for the agency's appointed commission or board members and executive management staff."

The only significant change to the pertinent parts of this Section occur in the caption which has been changed from "Sec. 53. Tort Claims Act" to "Sec. 57. Purchase of Insurance." The Legislature intended by this new caption to more clearly reflect the meaning of the Section. And while the caption is not dispositive of Legislative intent, Tex. Gov't. Code, §311.024, a caption is an aid to statutory construction, Government Code §311.023. The broader language of the new caption demonstrates a legislative intent to authorize the purchase of director's and officer's liability insurance to cover risks to which individual board members and executive management staff are exposed. These court judgments involved are above the indemnification amounts

provided by law and are thus not subject to indemnification. Board members have been, in fact, subject to judgments in amounts exceeding the indemnification limits under the Official Indemnity Act.

This change clearly shows that DM-346 was wrongly decided and the Attorney General should also reach this conclusion.

POINT 2

Whether there are claims under the common law and statutes, which if asserted against agency board members and executive management staff subject these individuals to judgments for damages.

Board members (directors) and executive managers (officers) of public agencies incur significant potential liability from merely occupying their offices. The principal source of this liability is found in federal law at 42 U.S.C. §1983. This provision of federal law can make board members or executive managers of public agencies liable for any deprivation of a federal constitutional or statutory right under color of state law that occurs within the agency under supervision. Virtually all agency actions occur under color of state law. Any deprivation of an alleged federally protected right creates a potential cause of action. As courts often say §1983 does not in and of itself define rights, it creates remedies. Those remedies are against board members and executive managers of state agencies. §1983 was adopted before the ratification by the States of the United States of the Fourteenth Amendment. Because of this, the Eleventh Amendment applies and the State itself is not a proper party defendant in a §1983 suit. The State is not a "person" within the meaning of 42 U.S.C. §1983. State officials may be sued for injunctive relief in their "official capacities." Damages may only be recovered via §1983 against board members or executive managers in their individual capacities. There is no limitation of damages or cap under §1983, and judgments have been entered greatly in excess of the amounts which may be indemnified under the Official Indemnity Act.

The Official Indemnity Act, Tex. Civ. Prac. & Rem. Code, Chapter 104, provides the possibility of board members or executive managers being protected up to the limits of the Act (\$100,000.⁰⁰ per person, \$300,000.⁰⁰ per occurrence). This statute does not fully protect board members and executive managers from judgments in excess of those amounts. Director's and executive managers need insurance in order to protect them when judgments are entered in excess of the indemnity amounts provided in the Official Indemnity Act.

It is important to emphasize that in many, if not most §1983 suits, board members or executive managers of the state agency are not the primary actors in the alleged civil rights violation. Often liability is incurred by lower level employees under direct or indirect supervision of state agency board members or executive managers. §1983 does not allow for damages under a respondeat superior theory of recovery. It does allow a plaintiff to recover damages against a board member or executive manager under the theory that senior management did not adequately manage, train or supervise the employee who engaged in the alleged deprivation of rights. This theory of recovery provides a back door through which plaintiffs can enforce and vindicate all their civil rights claims against board members or executive managers of an agency. Examples of civil rights provisions that are put into play and thus "protected" via this approach include:

First Amendment	Freedom of Speech
First Amendment	Freedom of Association
Fourth Amendment	Protection from Illegal Searches and Seizures
Fourteenth Amendment	Due Process Protection
Fourteenth Amendment	Liberty Interest Protection
42 U.S.C. §1981	Protection from Race Discrimination
42 U.S.C. §1981(g)	Protection from Race and Sex Discrimination
Title VII	Race & National Origin and Sex Discrimination
Title IX	Sex Discrimination
Americans with Disabilities Act	Discrimination Based on Disability
Rehabilitation Act of 1974	Discrimination Based on Disability

This list presents only the most utilized statutes which are "bootstrapped" by §1983. A review of the current active files within the Texas Attorney General's office will reveal numerous other examples.

In sum, the issue of protection from liability is a major concern to the individuals who occupy the position of board members and executive managers within state agencies. The use or potential use of 42 U.S.C. §1983 by the plaintiffs' civil rights bar poses significant risks of liability exposure beyond the limits of protection afforded by Tex. Gov't. Code, Chapter 104. The purchase of insurance significantly ameliorates these risks.

Such insurance is a proper component of state employee compensation and within the prerogative of each state agency to purchase because it fulfills a legitimate public purpose. Agencies are thus able to obtain and retain the services of capable board members and executive managers who have to make decisions which are in the best interests of the State rather than dodge difficult decisions out of fear of personal liability.

POINT 3

Whether Sec. 57 of the General Appropriations Act of 1995 can be construed so that it will reach a reasonable result.

The rules of statutory construction are applicable to Sec. 57. These rules are generally discussed in the Tex. Gov't. Code, §311.021, et seq. Specific rules applicable to Sec. 57 are discussed as follows:

- 1) The construction placed upon a statute by the agency charged with its administration is entitled to weight. Ex Parte Roloff, 510 S.W.2d 913, 915 (Tex. 1975); Tex. Gov't. Code, §311.023(6). In this instance those agencies are the General Services Commission and the Comptroller of Public Accounts.

Officials within the General Services Commission issued an invitation for bids to purchase director's and officer's liability insurance for TRC and several other state agencies. Subsequently, these officials of the General Services Commission approved the purchase of such coverage from an insurance company which had submitted the lowest and best bid.

Officials in the Comptroller of Public Accounts have approved the issuance of State warrants to pay the premiums on the above reference director's and officer's liability insurance, and continue to approve payments by agencies with director's and officer's liability insurance coverage in force.

These affirmative acts by officials of these agencies demonstrate their construction of Sec. 53 and Sec. 57 which allows director's and officer's liability insurance to be purchased to cover losses arising under the common law and other statutes. In so doing, these agencies have determined the meaning of Sec. 53, and Sec. 57, Tex. Gov't. Code, §311.021(2), and have produced a reasonable result, *Id.*, §311.021(4).

It is clear that the Legislature has approved the construction placed on Secs. 53 and 57 by the General Services Commission and the Comptroller of Public Accounts. Federal Crude Oil Company v. Yount-Lee Oil Company, 122 Tex. 21, 52 S.W.2d 56 (1932). Again, this shows that DM-346 was wrongly decided.

- 2) The 1995 General Appropriations Act, Sec. 57, provided a construction aid by changing the caption and, also, describing a method for determining legislative intent:

"Sec. 26. Interpretation of Legislative Intent. It is intent of the Legislature that funds appropriated by this Act be expended, as nearly as practicable, for the purposes for which they were appropriated. In the event departments and agencies cannot determine legislative purpose from the pattern of appropriations they shall seek to determine that purpose from the proceedings of the legislative committees responsible for proposing appropriations for the State of Texas.

It is further provided that the Comptroller shall not refuse to pass for payment a legal claim, factually justified, for which a valid appropriation has been made."

1995 General Appropriations Act, Article IX, Sec. 26

If the interpretations of the General Services Commission and the Comptroller of Public Accounts have not clarified legislative intent, then compliance with Sec. 26 would appear appropriate. TRC requests that the reconsideration of DM-346 demonstrate compliance with Sec. 26.

- 3) The Legislature is presumed to intend to comply with the Texas Constitution, Tex. Gov't. Code, §311.021(1). As demonstrated herein, all of the Constitutional problems identified are rectified by recognizing the purchase of director's and officer's liability insurance as a component of a state employee's compensation which serves a legitimate public purpose.

Moreover, most of the constitutional barriers perceived in DM-346 are based on the assumption that Sec. 53 violates the legislative policy not to waive immunity. However, as noted under Point 2 (*infra*), the risks sought to be covered do not involve sovereign immunity because the laws cited here either already waived immunity or provided that board members and executive managers may be liable under

the cited laws. They involve state officials who are sued in their individual capacities under 42 U.S.C §1983. Such damages can only be recovered against agency board members and executive managers in their individual capacities.

The TRC requests that the reconsideration presume the constitutionality of Sec. 57, and apply the appropriate rules of construction.

POINT 4

Whether Sec. 57 of the General Appropriations Act of 1995 violates the Texas Constitution.

- 1) At page 5 of DM-346 the Attorney General argues that Sec. 53 is not an item of appropriation and is "general legislation" subject to the prohibition of Article III, Sec. 35 of the Texas Constitution. The relevant portions of that Sec. read as follows:

"No bill (except general appropriations bills, which may embrace the various subjects and accounts, for and on account of which moneys are appropriated) shall contain more than one subject, which shall be expressed in the title."

Despite the lengthy exception, it has been held that appropriation bills must also focus on a single subject, the appropriation of funds to be paid from the treasury. Moore v. Sheppard, 144 Tex. 537, 192 S.W.2d 599 (1964).

In the case of Jessen Associates v. Bullock, 531 S.W.2d 593, 600 (Tex. 1976), the Supreme Court stated the rule as follows:

In determining whether a bill includes more than one subject, both the constitutional provision and the statute under consideration are to be liberally construed in favor of constitutionality. Robinson v. Hill, 507 S.W.2d 521 (Tex. 1974); Central Education Agency v. Independent School District of City of El Paso, 152 Tex. 56, 254 S.W.2d 357 (1953). The statute will be upheld where its provisions relate, directly or indirectly, to the same general subject, and have a mutual connection. See Robinson v. Hill, supra, and cases cited therein. Or, stated differently, the provision is valid where it is germane to the subject of the bill."

The Supreme Court applied the rule to an appropriations act rider which approved the construction of several university buildings without the "specific legislative approval" required under the Education Code, and held that the rider did not violate the Texas Constitution:

"In authorizing the expenditure of funds, it relates to the appropriation of funds. Likewise, it is germane to that subject. This subdivision merely directs the expenditure of appropriated funds, and is therefore permissible under Article III, Sec. 35, of the

Constitution. Conley v. Daughters of the Republic, 106 Tex. 80, 156 S.W. 197 (1913)."
(emphasis added)

Jessen Associates v. Bullock, (supra) 531 S.W.2d 106.

Thus, Sec. 53, now Sec. 57, does not deal with a subject alien to the appropriations act. It merely directs the expenditure of funds already appropriated, and authorizes the purchase of director's and officer's liability insurance with the funds already appropriated to state agencies.

- 2) At page 6 of DM-346, the Attorney General argues that Sec. 53 violates Article III, Sec. 51 of the Texas Constitution if Sec. 53 were intended to allow the purchase of liability policies covering claims arising under other statutes and the common law.

Article III, Sec. 51, prohibits the passage of legislation granting or loaning public money to an individual, association, or corporation. In the case of Byrd v. City of Dallas, 118 Tex. 28, 6 S.W.2d 738, 740 (1928), a city employee's pension plan was challenged as a giving away of public money. The court said:

"... if it is a part of the compensation of such employee for services rendered to the city, or if it be for a public purpose, then clearly it is a valid exercise of the legislative power."

The notion that legislation does not run afoul of Sec. 51 so long as the public benefit is not too remote has remained intact ever since the Byrd case.

In Attorney General Opinion JM-1156 (1990) the question was whether the below market lease of publicly owned land to a child care facility to operate a day care center for the children of state employees constituted the giving away of public money. The Opinion at page 5 noted that the lease had the public purpose of improving employee performance by reducing absenteeism, tardiness, and excessive turnover, and increasing morale, job satisfaction, and productivity.

Subsequently, in Letter Opinion #94-036, the Attorney General reviewed this same day care center to determine if children of non-state employees could be enrolled. The Opinion concluded that such children and their parents would be "*merely incidental beneficiaries of the expenditure of state funds for a legitimate public purpose.*"

Thus, the purchase of liability insurance avoids the prohibition of Sec. 51 if it is considered a part of a state employee compensation or an employee benefit that provides incidental private benefits.

- 3) At page 5 of DM-346 the opinion states that "*(S)pecific statutory authority is necessary to authorize state agencies to purchase liability insurance,*" and cited Attorney General Opinions JM-625 (1987) and H-1318 (1978).

In JM-625 (1987) the Board of Nurse Examiners requested advice as to whether they could expend funds for liability insurance at a rented convention center. The Attorney General denied the request citing H-1318 (1978) and noting the apparent statutory authority to purchase such coverage under the Tort Claims Act, Civ. Prac. & Rem. Code §101.027, had been nullified by the 1985 General Appropriations Act's prohibition on the purchase of such coverage.

In H-1318 (1978) the Department of Mental Health and Mental Retardation sought approval to provide automobile liability insurance for non-employee foster parents. The Attorney General found general authorization for such an expenditure in the current appropriation act; however, he ruled that:

"... an appropriation in order to be valid must be supported by pre-existing law. Tex. Const. art. 3, §44."

H-1318, page 2.

Both of these Opinions can be distinguished on their facts from the circumstances at hand because neither of them involved state employees, nor the purchase of insurance coverage for their protection from loss associated with their employment.

From a legal standpoint, the "general law" requirement or "pre-existing law" requirement of the Texas Constitution, art. 3, §44, as discussed in H-1318, is best addressed by placing it in context:

"Article 3, §44 Compensation of public officers, servants, agents and contractors; extra compensation; unauthorized claims; unauthorized employment.

Sec. 44. The Legislature shall provide by law for the compensation of all officers, servants, agents and public contractors, not provided for in this Constitution, but shall not grant extra compensation to any officer, agent, servant, or public contractors, after such public service shall have been performed or contract entered into, for the performance of the same; nor grant, by appropriation or otherwise, any amount of money out the Treasury of the State, to any individual, on a claim, real or pretended, when the same shall not have been provided for by pre-existing law; nor employ any one in the name of the State, unless authorized by pre-existing law." (emphasis added)

Sec. 44, itself, in the first sentence, recognizes the Legislature's authority to provide "by law" for the compensation of its employees. The "by law" requirement is fulfilled by the appropriations act or the various state agency enabling acts empowering Commissioners to appoint *"the personnel necessary for the efficient performance of the functions of the agency."* (See Tex. Human Res. Code §111.020(b)).

DM-346 does not consider the possibility that liability insurance can be a proper component of employee compensation under existing law. However, the Opinion assumes without hesitation that liability insurance for employees must be supported by a specific pre-existing law, or violate Art. 3,

§ 44. In the case of Texas Department of Human Services v. Texas State Employees, 696 S.W.2d 164, 173 (Tex. App. 3 Dist., 1985, *no writ*), the Court held that a state agency could subsidize employee representatives at employee grievances without violating Art. 3, §44. The Court also noted that the choice of personnel policies "*are within the agencies prerogatives, so long as they are constitutional.*" *Id.*, 696 S.W.2d 174.

POINTS

Whether there are general laws to support Sec. 57 of the Appropriations Act.

In ascertaining the intent of the Legislature, all laws bearing on the same subject are to be considered and given effect. Duval Corporation v. Sadler, 407 S.W.2d 493 (Tex. 1966).

- 1) The enabling legislation of the state agencies authorizing the appointment of personnel necessary to perform the various functions of the agency (e.g., Hum. Res. Code, §111.020(6)) are sufficient general laws to grant the agencies discretion to purchase liability insurance as an employee benefit.
- 2) The Appropriations Act standing alone, or in pari materia with the state agency enabling legislation, is sufficient general law to authorize the purchase of liability insurance for board members and executive management staff. The rider in question directs the use of appropriated agency funds by approving an expenditure for insurance to cover board members and executive staff.
- 3) Tex. Civ. Prac. & Rem. Code, §104.003(b) makes the following reference to liability insurance:

"(b) The State is not liable under this chapter to the extent that damages are recoverable under a contract of insurance or under a plan of self-insurance authorized by statute."

In this provision, the Legislature acknowledges the function of liability insurance for state employees. When read in pari materia with the relevant provisions of the Appropriations Act and the state agency enabling acts, it appears that the Legislature has endorsed the practice of purchasing liability insurance. However, DM-346 renders this reference to "insurance" for the protection of state officials meaningless.

- 4) Art. 715c, V.T.C.S., authorizes state agencies to establish a self-insurance fund "*to protect the governmental unit and its officers, employees, and agents, from any insurable risk or hazard,*" Art. 715c, §4(a). In Attorney General Opinion DM-197, January 25, 1993, page 3, footnote 3, the Attorney General noted that the legislature had liability insurance in mind because of the provision in Sec. 6 of Art. 715c that "*the establishment and maintenance of a self-insurance program by a governmental unit does not constitute a waiver of immunity or defense of the governmental unit or its employees.*"

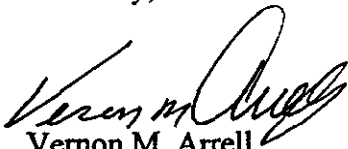
Given this interpretation of V.T.C.S., Art. 715c, please indicate in your reconsideration whether or not Art. 715c authorizes a state agency to set up a self-insurance fund; to make a fact finding that the funds will be more cost effective if used to purchase liability insurance; and to use such funds to purchase liability insurance as authorized by Sec. 57 of the General Appropriations Act of 1995.

It is also arguable that Art. 715c, §4(a) by authorizing the use of such funds "*to protect the governmental unit and its officers, employees, and agents from any insurable risk or hazard*" (emphasis added) constitutes a general law support for the use of public funds to protect public employees from personal liabilities of the type described under Point 2.

CONCLUSION

Please reconsider and set aside your Opinion in DM-346 regarding Sec. 53 of the 1993 General Appropriations Act and/or issue a new Attorney General's Opinion concluding that Sec. 57 of the 1995 General Appropriations Act authorizes state agencies to purchase director's and officer's liability insurance.

Sincerely,



Vernon M. Arrell
Commissioner

VMA/LWA/cdg

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CONCLUSION

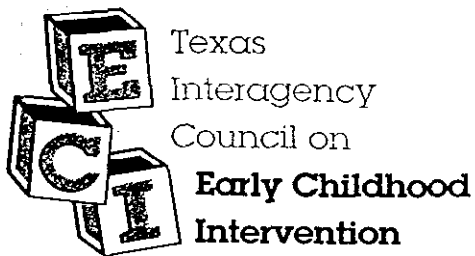
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Opinion Committee

RR-455

September 13, 1995

FILE # ML-35971-95

I.D. # 35971

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

Dear General Morales:

The Interagency Council on Early Childhood Intervention is requesting a reconsideration of Opinion No. DM-346 which states in part, with pertinent citations, "specific statutory authority is necessary to authorize state agencies to purchase liability insurance." The opinion also appears to limit the purchase of director's or officer's insurance to claims arising under the Texas Tort Claims Act.

Opinion No. DM-346 was based upon an interpretation of Section 53 of the General Appropriations Act of 1993. That section has now been replaced with Section 57 of the General Appropriations Act of 1995.

We believe that Section 57 will allow for a revised opinion and the purchase of director's or officer's liability insurance for other than Tort Claims Act issues since the stated coverage was expanded in Section 57 from "Tort Claims Act" to "Purchase of Insurance." We also believe that a thorough review of the legislative intent in promulgating Section 57 will support the revision of the legal rationale which led to the conclusion reached in Opinion No. DM-346.

Your expeditious response to this request for the reconsideration of Opinion No. DM-346 will be appreciated. If you need any additional information, please contact Alexander W. Porter, Staff Attorney at (512) 502-4900, Extension 5013.

Sincerely,

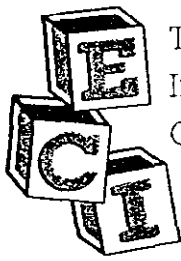
Mary Elder

Mary Elder
Executive Director

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Sincerely,

Mary Elder

Mary Elder
Executive Director

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